COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2014-SC-000215-D

John Charalambakis **Appellant**

On Review from Court of Appeals
Case No. 2012-CA-000242

v.

On Direct Appeal from
Jessamine Circuit Court No. 10-CI-00880

Asbury University, *et al.* **Appellees**

Appellant's Brief

CR 5.03 & 76.12(6) CERTIFICATE

I hereby certify that on the 15th day of December, 2014, a true and accurate copy of this Brief has been served by hand-delivery or U.S. mail, postage prepaid, on: Debra H. Dawahare, Esq., Leila G. O'Carra, Esq., WYATT, TARRANT & COMBS, 250 West Main Street, Suite 200, Lexington, KY 40507-1726; the Hon. Hunter Daugherty, JESSAMINE CIRCUIT COURT, 101 North Main St., Nicholasville, KY 40356; and, Samuel P. Givens, Jr., Clerk of the COURT OF APPEALS, 360 Democrat Drive, Frankfort, KY 40601.

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INTRODUCTION

This is an employment case in which Plaintiff-Appellant John Charalambakis appeals from summary judgments against his KRS Chapter 344 claims of discrimination and retaliation.

STATEMENT concerning ORAL ARGUMENT

Appellant states, pursuant to CR 76.12(4)(c)(ii), that he desires oral argument — which he believes would be helpful to the Court, particularly in considering the issues of first impression regarding the construction of the anti-retaliation provisions of KRS 344.280(1).

STATEMENT of POINTS and AUTHORITIES

STATEMENT of the CASE

facts chronology

John Charalambakis, a native of Greece, had been an economics professor at Asbury College (n/k/a Asbury University) since 1991. (Pl. 1/19/11 depo p.96; 2/2/11 depo p.328)[1] In mid-2007, an Asbury outsider, Jon Kulaga became provost. (R.1879 #12; R.1569; J.Kulaga 9/1/11 depo p.4) Soon after his arrival, Kulaga made fun of Charalambakis's foreign accent and questioned whether students could understand him. (R. 1881-82 #12) When Charalambakis expressed interest in being appointed chair of his department, Kulaga responded negatively — "But John, you have an accent" — and an American-born professor received the appointment. (*Id.*) Later on, when a student group and Charalambakis asked that he be approved as the group's adviser, Charalambakis was again passed over and a non-foreign professor given the nod by provost Kulaga. (Pl. depo pp. 36-37)

This was the context for Charalambakis when, in June 2009, Kulaga summarily informed Charalambakis that there were allegations against him that could lead to termination. (R.1212; R.1214-16/Apx.7) Three alumni had leveled complaints against him in matters external to Asbury, relating to "outside business ventures." (*See, esp.*, S.Gray 9/14/11 depo pp. 97-99, 112-13, 158; *see also* R.1244/Apx.12 p.7). Other Asbury personnel expressed the opinion that termination or probation were not supported for alleged

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[1] Most record references herein are to "R._," the number(s) assigned in the Circuit Court Clerk's consecutive pagination. Deposition transcripts and their exhibits that are in the record, as well as the trial exhibits, have not been given "R." page numbers. Reference to deposition material is by deponent's name, deposition date, and page or exhibit number; to trial exhibits, by party name, "Tr. Ex." and number; to the Appendix, by "Apx."

problems with such external activities. (*See, e.g.*, R.1252 ; Pl. Tr. Ex. 37; Zent 9/23/11 depo exs. 9 p.2, 12A; Apx.15)

The purported investigation dragged on for months, during which time Kulaga withheld from Charalambakis the written accusations and other documents purportedly supporting the allegations. (Kulaga 9/28/11 depo pp. 40-44) Yet Kulaga repeatedly demanded that Charalambakis address/disprove these accusations that were kept from him, and refused to meet with him. (*See* Pl's Tr. Ex. 5; Kulaga 9/28/11 depo pp. 33-34; R.1903-08) Third-party faculty members expressed concern over the amount of time the investigation/decision was taking and why the responses Charalambakis had already given were not deemed sufficient. (*See, e.g.*, Pl. depo ex. 66, 69, 73; R.1895/Apx.9; R.1222-23/ Apx.11)

In a 9/28/09 letter, Charalambakis complained about "discrimination" and "double standards" in the conduct of the investigation and in the threat of termination / probation for the non-university matters alleged. He noted that other faculty members, "native-born Americans," had not been disciplined despite alleged serious misconduct and referred to Kulaga's having mocked his accent in the past, and then invoked an internal grievance/dispute procedure for addressing his complaint against Kulaga. (R.1891-92/ Apx.8 pp.1-2) Kulaga never denied or otherwise responded to Charalambakis's allegation of discrimination, and he did not cooperate or participate in the internal dispute procedure's steps of (a) meeting with Charalambakis and other faculty members or (b) receiving assistance by the Vice-Chair of the Faculty acting as Charalambakis's ombudsman. (*See* R.1895/Apx.9; R.1222-23/Apx.11; Pl. 1/19/11 depo pp. 44, 277-78 & ex.75; Kulaga 9/28/11 depo p.14)

Charalambakis took his discrimination complaint to the Kentucky Commission on Human Rights ("KCHR") in late October / early November. (Pl. depo 1/19/11 pp. 42) When Kulaga and other Asbury administrators learned on November 11, 2009, of Charalambakis's resort to the KCHR, there was a rush to dig up additional allegations against him[2] and to issue a decision. By letter dated November 24, 2009, Kulaga announced that Charalambakis would be put on probation for two years. (R.1238-48/Apx.12) As an "additional issue" supporting his decision, Kulaga noted: "You have accused this office of retaliation, double standards, threats, discrimination, and harassment" (R. 1243, 1245/ Apx.12 pp. 6).

Charalambakis internally appealed the probation decision. The recommendation by a three member Faculty Appeals Committee ("FAC") chaired by Don Zent and the decision by Asbury president Sandra Gray in mid-February 2010 was to deny the appeal, upholding the probation sanction. During the appeal, a formal, written Charge of Discrimination was signed by Charalambakis (1/13/10) and received (1/15/10) and filed (2/2/10) by KCHR. (R.1918/Apx.13) It is clear that this resort to the KCHR angered the decision-makers. Charalambakis was told by FAC members — in person and in writing — that the KCHR complaint hurt his appeal and was the reason for the recommendation to uphold probation. (*See* R.1286/Apx.14 p.1; R.1070; Pl. depo ex. 169 p.3; Pl. 2/2/11 depo pp. 572-576 & ex. 107 p.1) Minutes from the 2/2/10 meeting between the FAC and president Gray show that Gray told the FAC that Charalambakis had filed "a formal dis-

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[2] Although he told Charalambakis in mid-July 2009 that he was "following up ... with the individuals bringing the allegations," Kulaga contacted only one accuser, on November 11, 2009, and to solicit negative information beyond the allegations about which Charalambakis had received notice. (*See* Pl's Tr. Ex. 5; Kulaga 9/28/11 depo pp.33-34; R.1903-08).

crimination complaint with the KCHR" and opined that this was grounds for termination. (R.1062)

After February 2010 discussions with a KCHR representative about retaliation (*see* Pl. depo exs. 110-12), Charalambakis signed a formal retaliation charge with the KCHR. This Amended Complaint was received by Asbury on March 22, 2010. (R.1920/ Apx.16) In the 3-4 weeks thereafter, Kulaga criticized Charalambakis's compliance with the probation ban on engaging in outside business ventures, withheld sending Charalambakis a 2010-11 proposed contract, and then terminated him. (Pl. Tr. Ex. 22, 23; R.1263-64; Apx.17) On an internal appeal of the termination decision, a second FAC was convened (again with Zent as chair). In early June 2010, the second FAC recommended denying his appeal, faulting Charalambakis for his continued internal opposition and challenge at the KCHR; Gray denied the appeal and made the termination decision final. (R.1271 item #2; 10/6/11 S. Gray depo ex. 20 & 19)

procedural events

Charalambakis filed his court Complaint against Asbury and the individual Defendants on August 3, 2010. (R.2-8) Defendants moved for summary judgment on all claims on October 7, 2011. (R.456-528) In the minutes prior to the 10/27/11 hearing, Defendants served a reply brief (R.1317-38) raising new grounds for their summary judgment motion, including that the retataliation claim failed as a matter of law if the discrimination claim was unsuccessful. Defendant's written submissions had belittled Charalambakis's discrimination claims, treated those claims as beginning with the KCHR's 2/2/10 filing of the written Charge, and presented every negative inference possible as if it were undisputed fact (usually without any citation to the record). The Circuit

Judge took much the same view and granted summary judgment against the national-origin discrimination claims. (*See* Apx.5, Order p.1)

Unlike the discrimination claim, however, the Circuit Judge viewed the facts for retaliation to be quite strong, because Defendants had "come right out and said 'don't proceed before the KCHR'; seems like that was sort of shooting themselves in the foot." (VR 10/27/11 01:43:54-01:44:14) Nonetheless, he was swayed by Defendants' late-presented argument that the retaliation claim was deficient as a matter of law if the discrimination claim was unsuccessful. He tentatively granted summary judgment as to the retaliation claims, pending receipt of supplemental citations and oral argument in a telephone hearing the following Monday. At the end of that 10/31/11 telephone hearing, summary judgment was denied as to the retaliation claims. (*See* Order p.1/Apx.5; VR 10/31/11) Nonetheless, nine days later, after Defendants moved *inter alia* for reconsideration (*see* R.1425-49), the Circuit Court reversed its 10/31/11 ruling and determined to grant summary judgment against the retaliation claims. (VR 11/9/11; *see* Order p.1/Apx.6)

After trial of the remaining, contract-breach claim, Judgment was entered in favor of Defendants on all claims on November 29, 2011. (R.1786-87/Apx.3) Plaintiff filed a timely CR 59 motion (R.1809-1927), which was denied by Order entered January 17, 2012. (R.1971-72).[3] On January 30, 2012, Charalambakis filed his Notice of Appeal (R.1977-78).

In late January 2012, Asbury was at trial in Jessamine Circuit No. 09-CI-00140, defending against discrimination and retaliation claims brought by another ex-employee,

[3] On the same day, a Supplemental Judgment as to costs was entered. (R.1973-74/Apx.4)

Deborah Powell. The jury found against Ms. Powell's discrimination claim, but for her retaliation claim; the final Judgment confirmed that result. Asbury's appeal (2012-CA-00653), overlapped with Charalambakis's appeal and presenting similar issues about the independence and sufficiency of the retaliation claim. Opinions completely affirming the respective judgments below were issued the same day in Charalambakis's appeal (Apx.1, 1/31/14 Opinion) and in Asbury's appeal.[4]

Charalambakis petitioned for rehearing of the 1/31/14 Opinion; his petition was denied on March 25, 2014 (Apx.2). Charalambakis moved for discretionary review on April 23, 2014; review was granted by this Court's Order entered October 15, 2014. Meanwhile, Asbury had moved for discretionary review of the *Powell* opinion, and review has been granted by this Court (2014-SC-095), also on October 15, 2014.

[4] Opinion Affirming, *Asbury College v. Deborah Powell*, 2012-CA-000653-MR (Ky. App. Jan. 31, 2014) (unpublished), *discretionary review granted*, 2014-SC-095 (Oct. 15, 2014). A copy is tendered as part of this brief for this Court's convenience, and in accordance with CR 76.28(4)(c).

ARGUMENT

I. A KRS 344.280(1) retaliation claim can go forward even if the associated discrimination claim fails.

A retaliation plaintiff is not required to establish that he has a meritorious claim of discrimination. Nothing in the text or purposes of KRS 344.280(1), in Kentucky caselaw, or in the construction of other jurisdictions' similar anti-retaliation statutes supports holding that a complainant must succeed on the merits of a discrimination claim in order to proceed on a KRS 344.280(1) retaliation claim. Nonetheless, both the Circuit Court and the Court of Appeals made the retaliation claim dependent on their view of the merits of the national-origin discrimination claim. This Court should now resolve this issue of first impression about KRS 344.280(1).[5]

A. Kentucky law does not make the merits of the discrimination claim an element of a retaliation claim.

KRS 344.280(1) does not make success on a complaint of discrimination a prerequisite for a retaliation claim:

> It shall be an unlawful practice for a person ...:
>
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter...

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[5] Plaintiff preserved this issue for review by opposing Defendants' motion for summary judgment (*see* R.1168-1287) and their arguments for dismissal raised subsequent thereto (*see, e.g.*, R.1367-1401; R.1482-84; VR 10/31/11; VR 11/9/11); this question of law was expressly presented in the Motion for Discretionary Review (p.2).

KRS 344.280. The General Assembly plainly understands how to include such a prerequisite in the Kentucky Civil Rights Act ("KCRA"), KRS ch. 344,[6] but did not do so in the proscription against retaliation.

KRS 344.280(1) protects two kinds of activities against retaliation:

- opposing "a practice declared unlawful by this chapter"; and
- participating "in any manner in any investigation, proceeding, or hearing under this chapter," including "made a charge, filed a complaint, testified, assisted...."

The latter includes any form of participation in KCRA-provided procedures, without regard to the eventual outcome. The former, "opposition" category includes complaints to the employer, initiating internal grievance or dispute procedures, public protests, and refusals to carry out discriminatory policies or decisions. The KRS 344.280(1) text limits protection to "opposition" directed at something the chapter declares to be unlawful, that is, a practice of a type that would be unlawful discrimination.[7]

Any attempt to "interpret" KRS 344.280(1) to include a meritoriousness requirement that is not actually in the text would also fall afoul of the dictate that ch. 344 "be construed to further the general purposes stated in [KRS 344.020(1)] and the special purposes of the particular provision involved." KRS 344.020(2). Depriving people of protection for contacting the KCHR (or raising concerns about discrimination with their employer) because it is determined later that there was no unlawful discrimination can only hinder the general KCRA purposes, KRS 344.020(1)(a)-(b), and the special KRS

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[6] *See* KRS 344.450 (granting civil remedies to persons "injured by an act *in violation* ... of this chapter") (emphasis added).

[7] Legislation cannot properly declare that this employer's action or that person's conduct was unlawful. *See* KY. CONST. §§ 26-28 (separating governmental powers and granting only legislative power to the General Assembly); *City of Louisville v. McDonald*, 470 S.W.2d 173, 178 (Ky. 1971) (distinguishing legislation from adjudication).

344.280(1) purpose of protecting those who act in opposition to discrimination or participation at the KCHR. Furthermore, all participation activity falls within the petitioning right guaranteed by the U.S. and Kentucky Constitutions.[8] As such, the activity would be protected anyway by the public-policy exception to the terminable-at-will doctrine;[9] and there is no basis for narrowing the express statutory protection in KRS 344.280(1) to only those contacts with the KCHR, EEOC, or similar governmental agency that result in a determination that there had been unlawful discrimination. Opposition activities like complaining to the employer or initiating an internal grievance procedure do not have the same constitutional basis for protection. However, narrowing the protection for opposition (but not participation) activity would then discourage employees from taking discrimination complaints and concerns to be their employers — contrary to the purposes stated in KRS 344.020(1).

Requiring a meritorious discrimination claim in order to establish a retaliation claim also would lead to anomalous and absurd results. In part, this is because the scope of the anti-retaliation provision is much wider than the scope of the anti-discrimination

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[8] U.S.. CONST. amend. I (the right of the people "to petition the government for a redress of grievances"); KY. CONST. §1, cl. 6 (inherent and inalienable right "of applying to those invested with the power of government for redress of grievances or other proper purpose, by petition, address or remonstrance").

[9] *See Hill v. Ky. Lottery Corp.*, 327 S.W.3d 412, 430-23 (Ky. 2010) (describing exception and holding that wrongful-discharge claim was not preempted by KRS 344.280(1) coverage of factually-related activity).

provisions [10] — protecting persons who are not the direct object of discrimination, reaching people other than employers, and forbidding conduct beyond that which could be an "adverse employment action." For example, none of the following could have a retaliation claim if success on the discrimination claim was a prerequisite:

- a male worker denied a promotion because he objected to a supervisor's statement of sexist reasons to fire a female co-worker, when the co-worker was not fired and no other adverse action was taken against her;
- an employee who filed a religious discrimination charge with KCHR, received negative evaluations and no raises thereafter, but the charge was dismissed on a determination that his employer had insufficient workers to be a covered "employer";
- a worker who joined a peaceful public rally against reputed widespread practices in the construction industry of hiring African-Americans only for the lowest-skilled jobs, and was fired from his sales job by a boss who said that he has family members in the construction business who did not like the rally's message.

A construction that makes the retaliation claim depend on the discrimination claim can produce absurd results even if the same person is both the discrimination and the retaliation claimant, the retaliator is her (covered) employer, and the retaliation also qualifies as an adverse employment action. For example, a jury could find that the adverse action had its roots in discriminatory animus, but in the end the only "but for" cause of the action was retaliation. The factual verdict that the adverse action was solely because of retalia-

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[10] *See, e.g., Brooks v. LFUCHC*, 132 S.W.3d 790, 804, 807-08 (Ky. 2004) (restriction of employee to her desk and reduced break time were insufficient to constitute constructive discharge and avoid directed verdict on discrimination claim, but were enough to be retaliation); *Hill*, 327 S.W.3d at 416-17 (noting verdict finding KRS 344.280(1) retaliation for claimants' public protests for perceived disability discrimination against a co-worker); *Mountain Clay, Inc. v. Commonwealth, Comm'n on Human Rights*, 830 S.W.2d 395 (Ky. App. 1992) (affirming KCHR decision that Mountain Clay's suit demanding that ex-employee be personally liable for all costs of defending her discrimination charge was itself unlawful retaliation; award for embarrassment and humiliation upheld).

tion for opposition or participation activity would require a verdict against the discrimination claim — which would then take the retaliation claim down with it.

The fundamental and necessary independence of retaliation claims from the associated discrimination claims or practices has been respected, but not expressly recognized by this Court's published decisions. For example, *Brooks v. LFUCHA*, 132 S.W.3d 790 (Ky. 2004), upheld a jury verdict on a retaliation claim despite a determination against the associated sex-discrimination claim. In *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003), this Court did the same; it did not demand that protected activity meet any criteria of success, but simply held: "Filing an EEO complaint is a protected activity." *Id.* at 135. No published Kentucky decision requires that protected activity be anything more than opposition to a type of practice that KRS ch. 344 declares unlawful, a communication addressed to the KCHR, or other participation in KCRA proceedings.

The *Powell* Court of Appeals panel succinctly determined that a retaliation claim is independent and distinct from the discrimination claim that underlies a retaliation claimant's opposition or participation:

> "[T]he retaliation claim can go forward even if the underlying discrimination claim fails. The retaliation claim has been brought based upon a complaint of discrimination, not the discrimination."

Powell slip op. at 7 (emphasis added; citing *Univ. of Texas SW Medical Center v. Nassar*, 133 S.Ct. 2517 (2013)). This is the correct result, which should now be authoritatively ruled by this Court.

B. Other jurisdictions do not impose a "success" requirement on retaliation claimants.

Federal and other states' statutes against employment discrimination also protect against retaliation for opposition and participation activity. Authoritative construction by

these jurisdictions strongly supports making retaliation protection independent of any eventual merits decision about the claimed discrimination.

1. Federal

Title 42 U.S.C. §2000e-3(a) makes it unlawful for an employer to discriminate against an employee

> because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The similar wording between KRS 344.280(1) and the federal anti-retaliation provision and policy considerations have led this Court to hold that "interpreting unlawful retaliation under the KCRA [should be] consistent with the interpretation of unlawful retaliation under federal law." *Brooks*, 132 S.W.3d at 803. Thus, it is significant that federal case-law has consistently rejected any "success" criterion for opposition or participation activity to be protected.

A federal retaliation violation "can be found whether or not the challenged practice ultimately is found to be unlawful." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579-80 (6th Cir. 2000). All the federal Circuits but one have ruled likewise;[11] no circuit has found the merits of the discrimination claim to be determinative of a retaliation claim. *See, e.g.*:

Circuit	Cases
D.C.	*Parker v. B&O R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981)
1st	*Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994); *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir.1980)

[11] No case on the issue could be found for the Federal Circuit, which may not have jurisdiction over Title VII claims.

Circuit	Cases
2nd	*McMenemy v. City of Rochester*, 241 F.3d 279, 285 (2nd Cir. 2001); *Davis v. State Univ. of New York*, 802 F.2d 638, 642 (2nd Cir.1986)
3rd	*Hicks v. ABT Assocs.*, 572 F.2d 960, 969 (3rd Cir. 1978)
4th	*EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406-07 (4th Cir. 2005)
5th	*Green v. Adm'rs of Tulane Educational Fund*, 284 F.3d 642, 657 (5th Cir. 2002); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir. Unit A Sept. 1981)
6th	*Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579-80 (6th Cir. 2000); *Wasek v. Arrow Energy Serv., Inc.*, 682 F.3d 463, 470 (6th Cir. 2012)
7th	*Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980); *Dey v. Colt Const. & Development Co.*, 28 F.3d 1446, 1457-58 (7th Cir. 1994)
8th	*Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir.1981)
9th	*Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Trent v. Valley Electric Assoc., Inc.*, 41 F.3d 524, 526-27 (9th Cir. 1994); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 913 (9th Cir. 2001)
10th	*Love v. Re/Max of America*, 738 F.2d 383, 386 (10th Cir. 1984)
11th	*Rollins v. State of Fla. Dept. of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (*per curiam*)

The EEOC Compliance Manual section on retaliation, issued in May 1998, thus refers to this rule as well-settled.[12] The U.S. Supreme Court has not expressly ruled on this issue;

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[12] EEOC Compliance Manual §8-II.B.3.b, at 8-8. The current Manual retaliation section (§8) is available on-line through the EEOC website: http://www.eeoc.gov/policy/docs/retal.html or http://www.eeoc.gov/policy/docs/retal.pdf (last visited 12/8/14).

however, like this Court, its decisions have tacitly respected the independence of retaliation claims from the associated discrimination claims. *See, e.g., Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (*per curiam*) (applying, but not adopting, rule used by the Ninth Circuit).

The federal courts have rejected the addition of a "success" requirement for practical, public-policy reasons. The Supreme Court has noted "documented indications that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271, 279 (2009) (reversing retaliation summary judgment). Requiring a finding of actual illegal employment discrimination in order for opposition activity to be protected would "undermine ... the elimination of employment discrimination by informal means; destroy[] one of the chief means of achieving that purpose, the frank and non-disruptive exchange of ideas between employers and employees; and serve[] no redeeming statutory or policy purposes of its own." *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980).[13]

2. Other States

Other states have anti-retaliation provisions in their fair employment practices statutes that are more or less like those in KRS 344.280(1) and 42 U.S.C. § 2000e-3(a). Differences in wording, history, and approaches make it difficult to generalize about state-law decisions; however, the clear consensus among state courts is that protection from retaliation does not require that opposition or participation be about actual unlawful

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[13] *See also Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (applying Title VII law to similar Michigan statute; noting purpose "to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged").

discrimination. For example, this has been the holding in California, Kansas, Nebraska, Massachusetts, and West Virginia.[14] The one state court case often cited as to the contrary is *Bordell v. General Elec. Co.*, 88 N.Y.2d 869, 667 N.E.2d 922 (1996), which required that an employee oppose an actual violation of law to be protected from retaliation by employer under New York's Labor Law §740(2).[15] The basis for that holding is plain from the language of the statute, which protects only opposition or participation activity that is addressed to practices or policies "in violation of the law." Where a state's anti-retaliation statute has language similar to KRS 344.280(1), no example has been found that makes its protections depend on a meritorious discrimination claim.

C. No "good faith" restriction on opposition activities should be added to KRS 344.280(1).

If an employer takes an adverse action against a worker because of his opposition or participation relating to alleged discrimination, how could that ever be allowable under the text of KRS 344.280(1)? Simply put, it is not allowed. However, courts have imposed additional criteria to test whether activity is protected "opposition." These criteria have arisen from the common sense that, for example,

- firebombing the employer's business to protest its discriminatory practices should be grounds for firing an employee; or
- demanding special treatment for being the youngest in the workforce should not qualify as opposition to unlawful practices merely because the demander thinks it is; or

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[14] *Sada v. Robert F. Kennedy Med'l Center*, 56 Cal.App.4th 138, 161 n.27 (1997); *McCabe v. Board of Johnson County Comm'rs*, 615 P.2d 780, 784-85 (Kan. App. 1980); *Abramian v. President & Fellows of Harvard College*, 731 N.E.2d 1075, 1088 (Mass. 2000); *Wolfe v. Becton Dickinson and Co.*, 662 N.W.2d 599, 605 (Neb. 2003); *Conrad v. ARA Szabo*, 480 S.E.2d 801, 813-14 (W.Va. 1996).

[15] Note, too, that New York's Labor Law covers wages, hours, safety, and similar topics — but not employment discrimination.

- gossiping to a supervisor about intra-office relationships that might constitute or lead to harassment or status-based discrimination claims should not later be claimed to have been "opposition."

The caselaw consensus for Title VII and other states' anti-retaliation statutes is to require that the manner of opposition activity be reasonable and undertaken with a subjective and/or objective good-faith belief that the opposed practices are unlawful.[16] These additional criteria are not applied to participation activity.[17]

This Court has not ruled that — in order to be protected — opposition activity must be "reasonable" in time, place, or manner or the retaliation claimant must have had a good-faith belief that what she was opposing was unlawful discrimination. Nor should it add such restrictions in this case. First, the existing framework established for assessing retaliation claims and applied in *Brooks* and *McCullough* is fully adequate for determining what claims are triable and what verdicts are sustainable. Second, adding such a requirement would work against the purposes of KRS 344.280(1) and the KCRA. The lack of a "good-faith" restriction on participation activity does not prevent an employer from firing or otherwise sanctioning an employee for prior or otherwise unrelated workplace misconduct[18]; therefore, whatever perceived gains there might be from imposing such a restriction on opposition activity are slight and more than offset by the perverse

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[16] *See, generally,* EEOC Manual §8-II.B.3.b & c, at 8-7 to 8-9 (federal law); *Wolfe v. Becton Dickinson and Co.*, 662 N.W.2d 599, 605 (Neb. 2003) (gathering cases).

[17] *Compare* EEOC Compliance Manual § 8-II B.3.b, at 8-8 (opposition clause) *with id.* § 8-II.C.2, at 8-10 (participation clause). *See Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (*per curiam*) (applying Ninth Circuit's reasonable belief standard to opposition-based retaliation claim but not to participation-based retaliation claim).

[18] *See, e.g., Booker v. Brown & Williamson Tobacco Co., Inc.* 879 F.2d 1304, 1312 (6th Cir. 1989) (noting that filing a complaint or a charge does not create any right on the part of the employee to ignore workplace rules); *Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001, 1013 (6th Cir. 2007) (no evidence that a continued failure to promote was due to employee's filing discrimination complaint).

incentive created for employees to race to the KCHR or EEOC at the first hint of adverse action. Contrary to KRS 344.020, judicially narrowing opposition protection would "not only chill the legitimate assertion of employee rights under [anti-discrimination statutes], but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances." *Sias*, 588 F.2d at 695.[19]

Third, the existence (or not) of a "good-faith" or reasonableness requirement is not a determinative issue in this case. Because provost Kulaga refused to meet with Charalambakis or cooperate with the internal-dispute process, the period of solely internal opposition activity lasted only 4-6 weeks and none of the adverse actions had been taken before Kulaga's participation activity began. Furthermore, there has been no contention that Charalambakis's opposition activity was unreasonable in time, place, or manner,[20] and his opposition meets the usual tests for "good faith" on evidence already in the record. Finally, the Court of Appeals did not expressly rely on a subjective or objective reasonableness criterion to affirm the Circuit Court summary judgment (*see* Apx.1) — and the Circuit Court did not refer to the issue in its written Order granting summary judgment (*see* Apx.6). Defendants did not even try to make an issue of "good faith" until after the briefing and hearings on their motion for summary judgment. Thus, on prudential as well as substantive grounds, no "good faith" requirements should be added to KRS 344.280(1) in this case.

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[19] *See also Parker*, 652 F.2d at 1019: "The remedial purposes of Title VII would be ill served by telling employees that they can be sure of protection only if they limit their complaints about discrimination to formal EEOC filings, and that internal opposition, though encouraged, is undertaken 'at the accuser's peril'...."

[20] Although Kulaga had been vehement in denying the applicability or legitimacy of the internal dispute procedure that Charalambakis had invoked, he later admitted that the procedures were appropriate if headed up by the Vice Chair of the Faculty. (Apx.11, p.1)

II. Summary disposition of the retaliation and national-origin discrimination claims was erroneous.

The Circuit Court and the Court of Appeals committed different mistakes in respectively granting and upholding summary judgment against the retaliation and national-origin discrimination claims. They thus have generated different issues for review.[1] These errors of law all require the same result, however — remand to the Jessamine Circuit Court for trial of the claims on their merits.

A. The retaliation claim should be tried.

A *prima facie* case of retaliation under KRS 344.280(1) requires a showing that: (1) the plaintiff engaged in a protected activity; (2) the exercise of civil rights was known by the defendant; (3) the defendant thereafter took an employment action adverse to the plaintiff; and (4) there was a causal connection between the plaintiff's protected activity and the defendant's adverse employment action. *Brooks v. LFUCHA*, 132 S.W.3d 790, 803 (Ky. 2004). If there is no direct evidence of a causal connection and the employer articulates a non-retaliatory reason for the adverse action, then the plaintiff is to be given the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for [retaliation]." *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003) (internal quotation marks omitted; alteration in original).

Charalambakis met these tests at the summary judgment stage, and the Circuit Court and the Court of Appeals erred as a matter of law by, respectively, dismissing the

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[1] Appellant preserved the retaliation and discrimination claim issues for review by opposing Defendants' motion for summary judgment (*see* R.1168-1287), as well as their subsequent arguments for dismissal of the retaliation claim (*see, e.g.*, R.1367- 1401; R.1482-84; VR 10/31/11; VR 11/9/11). These summary-judgment issues were also expressly presented in the Motion for Discretionary Review.

retaliation claim and affirming that summary judgment. The Circuit Court opined that the factual case for retaliation was direct and strong (VR 10/27/11 01:43:54–01:44:14), but that as a matter of law the retaliation claim could not go forward after summary judgment had been granted against the discrimination claim. That error was addressed in part I above; subpart A.3 below addresses the possibility that the Circuit Court summarily ruled against the retaliation claim on the notion that Charalambakis's opposition was not in good faith. The Court of Appeals, on the other hand, held that all but the fourth prong (causal connection) of the *prima facie* test were established by the record — but that there was no direct or circumstantial evidence of a causal connection between Charalambakis's protected activities and Asbury's adverse employment actions. These errors are addressed in subparts A.1 and 2 below.

1. Direct evidence of retaliation does not require exclusion of every other reason for the employment decision.

The 11/31/14 Court of Appeals' Opinion (Apx.1, at 15-17) misconceived the applicable law in concluding that statements by Asbury decision-makers are not direct evidence of unlawful retaliation, despite expressing retaliatory animus and linking adverse employment actions with protected opposition and participation activity. "Direct evidence of an unlawful employment practice is evidence that directly reflects the alleged animus and that bears squarely on the contested employment decision...." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 710 (Ky. App. 2004).[2] Direct evidence of a causal connection usually consists of "written or oral statements, most likely made by the

[2] Title VII cases typically define direct evidence as "that evidence which, if believed requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's action." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999); *see also DiCarlo v. Potter*, 358 F.3d 408, 417 (6th Cir. 2004) (noting direct evidence that discriminatory animus "played a role in the decision to terminate").

decision-maker responsible for the adverse action against the plaintiff." *McCullough*, 123 S.W.3d at 135. In such cases there is no need to infer that the decision-maker had a retaliatory animus or that a statement unassociated with consideration of the employment action might have been a factor in such consideration.[3]

Direct evidence does not have to be so preclusive that summary judgment must be given to Charalambakis on the retaliation claim. The ultimate causation questions — whether Charalambakis would have been put on probation or terminated but for his protected activities[4] — remain to be answered by a jury at trial. The *McDonnell Douglas* framework is only a procedural device; once defendant meets its burden of showing a non-retaliatory reason, "the case proceeds with the plaintiff having to meet her initial burden of persuading the trier of fact ... that the defendant unlawfully retaliated against her." *McCullough*, 123 S.W.3d at 134.

The Circuit Judge recognized that there is direct evidence of retaliation, that Defendants had "come right out and said 'don't proceed before the KCHR'" (VR 10/27/11 01:43:54-01:44:14). In the Court of Appeals' view, however, there is no direct evidence of retaliation. It simply ignores some statements by decision-makers, *e.g.*, Kulaga's listing Charalambakis's discrimination complaint as support for the decision to put him on probation (Apx.12 p.6). Other statements are characterized as "subject to a variety of interpretations and require an inference to show a retaliatory motivation" (1/31/14 Opinion

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[3] *See, e.g., Weigel v. Baptist Hosp. of E. Tennessee*, 302 F.3d 367, 383 (6th Cir. 2002) (negative reaction to a discrimination complaint "does not constitute direct evidence of discrimination unless [plaintiff] can show that [these] views influenced, or at least were communicated to, the relevant decision maker"; emphasis added).

[4] For the sake of his argument, Appellant uses this more stringent, "but-for" standard held to apply to Title VII retaliation claims in *Univ. of Texas Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517, 2534 (2013). It is Appellant's understanding that the standard to apply to KRS 344.280(1) retaliation claims is at issue in the *Powell* case (2014-SC-095).

at 5) and a non-problematic meaning is hypothesized for them; this is the treatment for, *e.g.*, Zent's urging Charalambakis to withdraw the KCHR charge because "you are hurting not only the college and Dr. Kulaga but also you are making the defense of your case weaker" (Apx.14 p.1).[5]

The 1/31/14 Opinion thus incorrectly limits "direct evidence" to proof that completely excludes any non-retaliatory reason for the adverse employment decision. The Court of Appeals' approach also involves taking a view of such statements that is wholly unfavorable to Charalambakis's claims — *e.g.*, that statements might mean something different from what they say or that a negative reaction to Charalambakis's opposition or participation activity might not in the end have influenced the employment decision. This negative perspective is contrary to the summary-judgment rule that the evidence "must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Svc. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991); *cf. McCullough*, 123 S.W.3d at 134 (similar standard for directed verdict motion).

2. Preexisting employer threats or steps toward adverse action do not immunize retaliation against protected opposition or participation.

Assuming, *arguendo*, that Asbury decision-makers' expressions of retaliatory animus do not constitute direct evidence of retaliation, they would add to the indirect (circumstantial) evidence that Charalambakis was put on probation and terminated be-

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[5] *Compare with Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir.1997) (finding direct evidence of retaliation in fact that company president told the plaintiff at the time of his termination that his testimony in a co-worker's Title VII suit was "the most damning" to the company's case).

cause of his opposition and participation activities. Circumstantial proof usually is in the form of evidence that

> (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action.

Brooks, 132 S.W.3d at 804; *McCullough*, 123 S.W.3d at 135. The Court of Appeals acknowledged that "the probation and termination decisions closely followed Charalambakis's protected activities," but then mistakenly ruled that that there could be no causal connection:

> Kulaga was contemplating Charalambakis's possible termination at the inception of the investigation into complaints by former students. Charalambakis's protected activities occurred after the alleged misconduct and after the investigation was already underway. Under these circumstances, the close temporal proximity of Charalambakis's actions to the adverse employment decisions cannot raise an inference of causation.

1/31/14 Opinion (Apx.1) at 19. This opinion that "close temporal proximity between filing a discrimination claim and an adverse employment action is immaterial if the employer was contemplating the adverse action before it learned of the protected activity," *id.* at 18 (emphasis added), is a distortion of the law. Neither Asbury nor any other employer can use what may have started as a "legitimate" investigation to immunize retaliation against an employee's protected activity.

The middle two *Brooks* elements are that (a) the protected activity has been known to the decision-maker (b) who subsequently took an action adverse to the employee. It is inherent in those elements that "an adverse employment decision that predates a protected activity cannot be caused by that activity." *Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 671 F.3d 49, 56 (1st Cir. 2012) (quoted

by 1/31/14 Opinion at 18). Thus, *Reynolds v. Extendicare Health Servs., Inc.*, 257 F. App'x 914, 920 (6th Cir. 2007), which is cited by the Court of Appeals as supporting its rule that temporal proximity is "immaterial," found only that a decision made (but not announced) before the employee's protected activity could not be the basis for a retaliation claim. *Breeden* held that an employee's transfer to a new position "carried through" one month after her supervisor learned she had filed a Title VII suit was not circumstantial evidence of retaliation, given that the supervisor told the employee's union representative about the contemplated transfer before learning of the suit. In that context, the court noted that an employer's "proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatsoever of causality." *Breeden,* 532 U.S. at 272. Neither case supports a proposition that temporal proximity is immaterial if the employer had merely "contemplated" the adverse action before learning of the protected activity.

A Kentucky court or jury could look at the circumstances in *Reynolds* or *Breeden* and conclude that the employer had not taken an adverse employment action subsequent to learning of the employee's protected activity — and so the plaintiff had failed to meet the third *Brooks* element. Or a Kentucky jury could conclude that because the employer had "proceeded along lines previously contemplated, though not yet definitively determined," *Breeden*, 532 U.S at 272, the employer's proffered non-retaliatory reason for the adverse action was not pretext. However, the evidence from the Defendants in this case is that Asbury did not "proceed along lines previously contemplated" and that probation and termination were not decided before learning of Charalambakis's opposition and participation activities.

The only decisions or actions taken before any protected activity were Kulaga's initiation of the investigation and demands for documentation from Charalambakis. The probation decision letter is dated November 24, 2009. Even though it may have reached the "not yet definitively determined" stage before that date, there is no evidence (or claim by Asbury) that Kulaga's decision preceded the close of the investigation. And it is undisputed that Kulaga's first contact and the only interview of any of Charalambakis's three accusers was after he learned (on November 11, 2009) that Charalambakis had taken his discrimination complaint to the KCHR. Thus, for all of the probation and termination decisions — by provost Kulaga, the FACs, and president Gray — the decision-maker "was aware of the protected activity at the time that the adverse decision was made." *Brooks*, 132 S.W.3d at 804.

Furthermore, the evidence is that things changed on November 11, 2009, when Asbury administrators learned of Charalambakis's contact with the KCHR, and thus Asbury did not merely "proceed[] along lines previously contemplated." New allegations against Charalambakis were actively sought, and Kulaga's 11/24/09 probation decision relies on alleged conduct not cited as a basis for investigating Charalambakis in the first place, and does not find either that the originally-described accusations were all true or that they were sufficient to warrant any adverse action at all. *Compare* 6/23/09 investigation initiation letter (Apx.7) *with* 11/24/09 probation decision (Apx.12). Over the next 6-7 months, decision-makers focused ever more intensely and angrily on a perception that

Charalambakis had violated Asbury norms by "involving" the KCHR, and any claimed connection with the original accusations faded away.[6]

Kulaga had initiated the investigation with a statement that he had received information about

> alleged problems of professional misconduct that I consider to be a reasonable cause for concern for Asbury College and if determined to be true, may result in termination.

(Apx.7 p.1 (emphasis added)) However, this early threat of termination does not make it factually impossible for there to be a causal connection between protected activities and subsequent probation decisions and even later termination decisions. Nor is it then legally impossible to maintain a retaliation claim. In fact, until some employment harm occurs or is threatened, there would usually be no basis for an employee to complain about discrimination internally or to the KCHR. The rule proposed in the 1/31/14 Opinion thus would allow employers to avoid any liability for actual retaliatory conduct if they simply state (the earlier the better) that they are "contemplating" the strongest of sanctions against an employee.

A rule that employers can give themselves *carte blanche* to retaliate against employees' protected opposition or participation defies common sense and the purpose behind the KCRA and KRS 344.280(1).[7] After learning of an employee's protected activity, an employer may proceed "along lines previously contemplated," sanction her for mis-

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[6] The second FAC's 6/7/10 meeting minutes do not mention any topic of the initial allegations except to grudgingly acknowledge that Charalambakis appeared to have disassociated himself from his outside business interests. (R.1271)

[7] *Cf. Hamilton v. GE*, 556 F.3d 428, 436 (6th Cir. 2009), which held that "an employer's intervening 'favorable treatment' does not insulate that employer from liability for retaliatory termination." The court found: "Were we to adopt GE's position, any employer could insulate itself from a charge of retaliatory termination by staging an incident to display its purported 'favorable treatment' and then waiting for a second opportunity to terminate the employee."

conduct already under investigation, newly discovered, or recently committed, or impose a stronger or different sanction than previously contemplated. The one thing that the employer may not do — retaliate because the employee engaged in protected activity — is completely within the employer's control.

3. Charalambakis had a reasonable, good-faith belief that he was being discriminated against on the basis of his national origin.

In announcing the summary dismissal of the retaliation claim right before trial (VR 11/9/11), the Circuit Judge mentioned Defendants' belated argument that Charalambakis's internal and external complaints of discrimination were not in good faith and so were not activities protected by the non-retaliation provision. No good faith or reasonableness restriction should be added to KRS 344.280(1) in this case (*see* part I.C above). However, even assuming *arguendo* that the statute's protection requires that opposition activity have a good faith or reasonable basis, the evidence shows that there was such a basis for Charalambakis's discrimination complaints.

Charalambakis's complaints to Kulaga and through Asbury's internal procedures in Fall 2009 were based on "a reasonable and good faith belief that the opposed practices were unlawful," EEOC Compliance Manual 8-II.B.3.b at 8-8, and that basis did not diminish once his participation activities began at the KCHR.[8] In his 9/28/09 letter to Kulaga (Apx.8 pp.1-2), Charalambakis expressed a complaint that he was being treated differently because of his non-U.S. national origin and that the provost had exhibited a nativist animus against him. At that point, his basis for such a complaint included facts that:

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[8] The "participation" clause in KRS 344.280(1) covered his contacts with the KCHR from "the instigation of proceedings leading to the filing of a complaint or a charge, including 'a visit to a government agency to inquire about filing a charge,'" *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989). *See also* KRS 344.280(1) (including both "made a charge" and "filed a complaint" within protected "participation").

- Kulaga had mocked his accent, cited it as a reason not to appoint him as department chair, and had selected a non-foreign faculty member rather than Charalambakis for appointments or assignments;
- more serious transgressions alleged against other (U.S. born) faculty members apparently had not merited disciplinary action;
- no other faculty member had been terminated, as was being threatened against Charalambakis, for policy violations of the type purportedly being investigated;
- Kulaga refused to meet with him or to have any faculty oversight of his initiation or conduct of the investigation, and continued to ask for documentation and written explanations from him without ever providing documentation or first-hand information supporting the allegations described in the 6/24/09 letter;
- Charalambakis had given documents and other responses to Kulaga more detailed and comprehensive than the disclosed "evidences" of the alleged problems and yet there appeared to be no end in sight of the investigation or of Kulaga's demands for additional information and explanations; and
- Kulaga either was not "following up ... with those individuals bringing the allegations" as promised or was not giving Charalambakis the promised opportunity to respond to "further allegations or information [that] arise during this process" (Pl. Tr. Ex. 5).

Furthermore, Charalambakis's subjective belief that the alleged problems did not merit the threat of termination/probation and that he had provided a satisfactory response to the allegations was objectively reasonable; there were similar opinions expressed by other faculty members (*see* Apx.9, 11 pp.3-4) and two members of the first Faculty Appeals Committee (*see, e.g.*, Zent 9/23/11 depo ex.9 p.2; Pl. Tr. Exs. 35-38, 42; *also* Apx.15).

Charalambakis went to the KCHR in late October / early November, when the effort to have his discrimination complaint addressed through the internal procedure had been stymied by Kulaga's refusal to participate and insistence that there could be no re-

view or oversight of what he was doing until the investigation was concluded and his decision announced. By that point, Charalambakis's good faith, reasonable basis for complaining of discrimination had been reinforced:

- there had been no denial by Kulaga of the allegations of discrimination or nativist animus;
- no explanation had been given as to why Charalambakis was being investigated when other alleged transgressions by faculty members were not;
- the investigation had not been closed or the response declared satisfactory, although the last steps apparently taken by Kulaga — in September — were to request additional information and to "allow" until September 30 to rebut the allegations (*see* Pl. Tr. Exh. 7 p.3);
- third-party faculty participants in the internal dispute process had not rejected the discrimination allegations, and had expressed concern about those allegations; and
- Kulaga had insisted that the internal dispute procedure was inapplicable,[9] without offering any alternative means for Charalambakis to have his discrimination complaint addressed internally.

Charalambakis efforts to have his discrimination complaint addressed internally did not cease after he contacted KCHR. For example, it was included among the grounds for his internal appeal (Pl. Tr. Ex. pp.10-12) and he defended his belief that Kulaga was discriminating against him in a January 2010 exchange with Zent (Apx.14 p.1).

B. As a matter of fact and law, Charalambakis has a triable claim that he was discriminated against on the basis of his national origin.

Charalambakis's complaints of national-origin discrimination made directly to Kulaga, through the internal dispute process, at the KCHR, and in the Circuit Court fo-

[9] In a confidential 11/16/09 email (Apx.11 pp.1-2), however, Kulaga acknowledged the internal dispute procedure as a reasonable mechanism for raising and investigating a discrimination claim.

cused on nativist bias overtly expressed by Kulaga in negative comments about his accent and in citing his accent as a reason for adverse employment actions,[10] as well as decisions made by Kulaga that favored U.S.-born professors over Charalambakis. The Circuit Court erred by giving no weight to Kulaga's express prejudiced statements and actions; the Court of Appeals erred by taking an unsupportably negative view of pretext evidence that claimed violations of Asbury policies were not the true (or sufficient) reason for putting Charalambakis on probation or terminating his employment.

1. Earlier discriminatory comments and actions are evidence of a nativist bias affecting later decisions.

The summary judgment against the discrimination claim was incorrectly influenced by the Circuit Court's impression that a jury would not find for Plaintiff on a national-origin discrimination claim due to Asbury's reputation for an international orientation. Even assuming, *arguendo*, that there was relevant, admissible evidence that the institution generally valued international connections and was open to those of non-U.S. national origins, this would not be competent evidence that employment decisions about Charalambakis were free of impermissible discrimination. Whatever might be the mindset of others at Asbury or in the past, Kulaga (who arrived in 2007) had expressed a prejudice against Charalambakis related to his national origins. The decision-makers were different when Charalambakis was hired, granted tenure, and promoted to full professor; any "internationalism" by earlier administrators could not be assumed to be shared by Kulaga or the rest of the administration in 2009-10.

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[10] Because national origin is inextricably intertwined with an individual's accent, an individual who is discriminated against because of the characteristics of his speech has a cause of action for national origin discrimination. *Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001, 1009 (6th Cir. 2007).

Discriminatory animus on Kulaga's part provides evidence that impermissible discrimination was the reason for the adverse employment actions taken against Charalambakis in 2009-10. However, the Circuit Court completely discounted incidents of Kulaga's prejudice that occurred before the investigation began in June 2009;[11] it appeared to categorize these early incidents as time barred, discrete discriminatory acts." Such time-barred earlier incidents are not, however, irrelevant; they may be used "as background evidence in support of a timely claim." *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). In *McCullough*, 123 S.W.3d at 135-36, this Court affirmed the trial court's use of nine time-barred adverse employment actions (non-promotions) to establish "a pattern and practice of adverse treatment, which began shortly after [plaintiff] filed the EEO complaint" and thus to supply the temporal proximity from which to infer a retaliatory motive.

Kulaga's negative expressions about Charalambakis's accent are direct evidence of an impermissible basis (national origin) for the past refusal to promote him to be department chair. *See Rodriguez*, 487 F.3d at 1009 (holding that HR manager's comments concerning Rodriguez's accent were direct evidence of national-origin discrimination). All these earlier incidents are also indirect evidence of an impermissible, discriminatory motive for the 2009-10 decisions to investigate the allegations, how to conduct that investigation, and to put Charalambakis on probation, and to terminate him— all of which were decisions made by Kulaga. In this case, Kulaga's own statements show a prejudiced mind-set and also a willingness to make employment decisions on such a prejudiced basis.

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[11] These incidents are summarized in the first item of the list on page 27 in part II.A.3 above; record cites to the evidence are given on page 1 of the facts chronology.

The bias evidence cited above, along with the evidence of different treatment already discussed in the retaliation-claim argument (*see* part II.A.3 above), supports a *prima facie* discrimination case for Charalambakis's probation and termination.[12] In addition, Charalambakis presented evidence meeting all the elements of an indirect case for his termination.[13] Thus, although not as blatant a case as for retaliation, Charalambakis met the initial, *prima facie* burden for his claim of impermissible national-origin-discrimination.

2. Defendants' own documents and statements show that "violations of policy" are not the real reasons for the probation and termination.

Asbury's articulated reason for the probation and termination was that Charalambakis violated its policies. Strictly speaking, this reason is not entirely non-retaliatory, given the 11/24/09 probation decision letter's claim that Charalambakis's opposition and participation activities violated various Asbury policies and so supported sanctions against him (*see* Apx.12 pp.6-7).[14] Nonetheless, the employer's burden to articulate a

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[12] The 1/31/14 Opinion (at 10-11) correctly notes that discrimination on the basis of accent is a form of national-origin discrimination, but then erroneously treats Kulaga's comments as irrelevant. Even if these prior statements are not direct evidence, they are evidentiary support for Charalambakis's claims of impermissible discrimination and pretext in Asbury's 2009-10 decisions about his probation and termination.

[13] In brief: Plaintiff (1) is a member of a protected class, *i.e.*, of non-U.S. national origin (Pl. 1/19/11 depo p.96), (2) was discharged although qualified to be an Asbury professor (*see, e.g.*, Apx.12 p.7), and (3) was replaced by someone outside the protected class (*see* Kulaga 9/28/11 depo. pp. 145-47). The Court of Appeals acknowledged that this presents a sufficient *prima facie* case to raise a presumption of unlawful discrimination in the termination decision. 1/31/14 Opinion at 9-10.

[14] *See also* Kulaga's accusation in the 4/14/10 termination decision letter that Charalambakis continues "to fabricate an environment of discrimination and retaliation" and that such statements clearly violate Asbury policies. (Apx.17 p.1)

legitimate reason is very minimal,[15] and so this part of the brief will assume *arguendo* that Asbury met the standard for articulating a "legitimate and nondiscriminatory reason" for adverse actions. *See Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 497 (Ky. 2005).

Also assuming *arguendo* that Charalambakis had no direct evidence of discriminatory or retaliatory intent (*but see* parts II.A.1 and II.B.1 above), he then would need to come forward with evidence that he would not have been put on probation or termination but for an impermissible reason. Consistent with the minimal burden placed on the defendant, a plaintiff's showing may be very slight and yet still be sufficient. *See McCullough*, 123 S.W.3d at 137 ("McCullough's proof of pretext was basically the same as her [indirect] proof of disparate treatment. .... On the other hand, while Appellants' reasons for not promoting McCullough in each instance were plausible, they were not compelling."). Typically, a plaintiff makes this showing by demonstrating "that the employer's stated reason for the termination was merely a pretext, masking the discriminatory motive," *Wal-Mart*, 184 S.W.3d at 497. Among the methods of showing pretext are:

> "(1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision.

Wal-Mart, 184 S.W.3d 492, 497 (Ky. 2005). Although these are typical methods of overcoming a proffered "legitimate" reason, any persuasive evidence on the issue will do. *McCullogh* at 134 ("Proof that the defendant's non-retaliatory reasons are 'unworthy of

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[15] *See e.g., Brooks*, 132 S.W.3d at 799, holding that the employer can meet this burden even if it claims that it cannot recall the actual reason, by providing evidence of "normal business practices and exemplary reasons consistent with those practices."

credence is simply one form of circumstantial evidence that is probative of intentional discrimination....'").

The Court of Appeals cursory consideration of pretext occurs in its discussion of the discrimination claim:

> Charalambakis's evidence was insufficient to establish the evidence of misconduct provided by outside sources was fabricated, did not motivate Asbury's actions or was insufficient to support the actions taken. The claims of misconduct were thoroughly investigated. Charalambakis was allowed to respond to them and his disagreement with their merit is insufficient to show they were pretextual.

1/31/14 Opinion at 13. This ignores all the evidence which points to retaliation as the real motivation for the probation and termination.[16] It also mischaracterizes the facts and misapplies the law.

Reasons can be found "false" within the meaning of *Wal-Mart* without evidence to show that investigated allegations were fabricated. Furthermore, neither Asbury's nor Charalambakis's assessment of whether there were violations is determinative of whether the allegations were false — even if there were "evidence of misconduct" or those claims had been "thoroughly investigated" or Charalambakis had been allowed to see and respond to the accusations Asbury had solicited or received.[17] The *Wal-Mart* test is to be applied in court, not determined by an interested party in an internal proceeding.

Furthermore, even if the references in the probation and termination letters to discrimination complaints and the "policy violation" of challenging the investigation in "other-venues" were not direct evidence of retaliation, they would nonetheless present *per se* evidence that other, "legitimate" bases claimed for the adverse employment actions

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[16] Evidence that the motivation was for retaliation rather than for legitimate business reasons is relevant to a discrimination claim because it discredits the defendant's proffered reason.

[17] None of which was true.

were not themselves sufficient. Additional evidence of pretext would come from contemporaneous assessments that (a) the allegations were insufficient for considering termination (*see esp.* Apx.15)[18] and (b) Charalambakis had adequately responded to the allegations (*see, e.g.*, Pl. depo ex. 66, 69, 73; Apx.9, 11), and the fact that Kulaga's probation decision relied on alleged conduct not cited as a basis for investigating Charalambakis (*compare* Apx.7 *with* Apx.12). Furthermore, the sequence of protected activity, Defendants' learning of it, and then action taken against Charalambakis is repeated many times over the period from September 2009 through October 2010. That repetition is itself evidence that temporal proximity is no mere coincidence or happenstance, and that Asbury's negative reactions were intentional retaliation. *See McCullough*, 123 S.W.3d at 136 (finding "a pattern and practice of adverse treatment" in a series of promotion denials).

C. Applying the same legal principles in the same way as in the *Powell* opinion requires reversal of the summary judgment against Charalambakis's KCRA claims.

The 1/31/14 Opinion conflicts with the Court of Appeals opinion in *Powell*, which held that there was sufficient evidence to support a jury's verdict that Asbury had retaliated against Ms. Powell for her internal grievance complaint of status-based discrimination. In two different ways, the legal principles and their application to support the *Powell* verdict *a fortiori* require reversal of the summary judgment against Charalambakis's discrimination and retaliation claims. First, as a matter of Kentucky law, although the standards for a summary judgment motion and a directed verdict motion are the same in theory, in practice "a ruling on a summary judgment is a more delicate matter ... since it

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[18] This 1/22/10 "Suggested Action" memo by a FAC member lists: "1. No evidence of wrong doing ... no grounds for action by College."; "2. Connection with liquor business ... not differ substantially from many other kinds of indirect involvement which have never been questioned, let alone disciplined."

takes the case away from the trier of fact before the evidence is actually heard." *Steelvest*, 807 S.W.2d at 482. Second, the evidence produced in opposition to Defendants' motion in this case is as strong as the evidence cited by the *Powell* opinion as sufficient to support the jury's retaliation verdict. Application of the same principles in the same way to the Charalambakis evidence requires a conclusion that a jury could have found that but for retaliation or discrimination, Asbury would not have put Charalambakis on probation or terminated his tenured employment.

Assuming *arguendo* that decision-makers' statements about Charalambakis expressing retaliatory animus and linking adverse employment actions with his protected activity do not constitute "direct evidence," they are nonetheless more-direct evidence of retaliation than anything referenced in the *Powell* opinion — which held that circumstantial evidence was sufficient for a *prima facie* retaliation case and to raise a jury question of pretext. *Powell* slip op. at 7-8. Yet none of these more-direct statements is even mentioned in the 1/31/14 Opinion's consideration of the circumstantial evidence for Charalambakis's retaliation claim (*see* Apx.1, slip op. at 17-19).

Furthermore, the evidence of a "'close temporal relationship' between the protected activity and the adverse action" held to circumstantially support the Powell retaliation verdict (*Powell* slip op. at 8) is not as strong as the temporal connection in the Charalambakis case. Ms. Powell's employment was terminated on March 3, 2008; the discrimination grievance mentioned in the *Powell* Opinion was against the provost who preceded Kulaga and so preceded her termination by at least 18 months. In contrast, Asbury (through Kulaga) became aware of Charalambakis's opposition activity less than two months before the initial probation decision (*see, e.g.*, Apx. 8, 12), and decision-makers

became aware of the formal, written KCHR charge and of the amended charge not more than a month before, respectively, the concluding steps for the probation decision and the initial termination decision. There is no reference in the *Powell* opinion to a similar, immediate reaction to Ms. Powell's discrimination complaints.

Charalambakis also has evidence fully comparable to that in *Powell* that Asbury's articulated "legitimate" reason for its employment actions was pretextual. In both cases, Asbury claimed its adverse actions were justified by policy violations — in Powell's case, alleged on-campus conduct about which there were student complaints (*Powell* slip op. at 2); in Charalambakis's case, alleged "misconduct related to [his] actions in running his outside business ventures" about which there were alumni complaints (1/31/14 Opinion at 2). Both Ms. Powell and Charalambakis presented evidence to support their respective denial of these allegations, and the *Powell* opinion (at 7) cites evidence about "the destroying by Kulaga of emails regarding his investigation into her assertions as well as his failure to follow protocol in dealing with the allegations of gender discrimination." Similarly, in Charalambakis's case, Kulaga admitted destroying his notes (9/1/11 depo. p.166), and he refused to participate and otherwise tried to block or limit internal procedures to address Charalambakis's discrimination complaints (*id.* exh.14; 9/28/11 Kulaga depo. exh.9; Apx.9). In addition, Charalambakis presented evidence that, even if the allegations that were the subject of Kulaga's investigation were true, the off-campus misconduct charged did not merit termination or even probation. (*See* part II.B.2 above; Apx. 9, 11, 15) Indeed, the initial probation decision does not rely on only the investigated charges, but expressly cites and relies on "additional issues that have developed during this investigation process," including the discrimination complaint. (Apx.16, pp. 6-8)

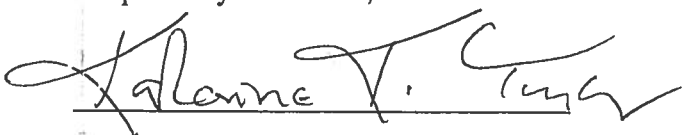
The 1/31/14 Opinion acknowledges (at 11) that entirely circumstantial evidence established a *prima facie* case of impermissible discrimination on the basis of national origin, but affirms the summary judgment against the discrimination claims by concluding that Charalambakis failed to establish that Asbury's stated nondiscriminatory reason ("violation of its policies") was pretext. In reaching this conclusion, the Court of Appeals not only overlooks the pretext evidence just discussed but also ignores bias evidence.

The Court of Appeals properly approached Asbury's appeal in *Powell* with the view of upholding what happened to Powell's retaliation claim once it went to trial, considering what evidence and inferences were sufficient to support the jury's verdict. It should have been no less careful in considering whether summary judgment had wrongly deprived Charalambakis of the opportunity to have his KCRA claims determined at trial.

CONCLUSION

WHEREFORE, for the reasons stated, Plaintiff-Appellant John Charalambakis respectfully requests that this Court vacate the summary judgment against his retaliation and national-origin discrimination claims and remand for further proceedings, including: trial on the merits of those claims.

Respectfully submitted,



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